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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

STEPHEN A. KOCZAK, KATHERINE E. ROTTER, and JOHN G. RESCH,
Appellants,

v.

G. DALLAS DIXON, THE MERCER COUNTY DEMOCRATIC CENTRAL COMMITTEE, JEFFREY LAURENTI, HOWARD KAYE, GERALD STOCKMAN, LOUISE LOMMA, JANE BURGIO, W. CARY EDWARDS, THOMAS H. KEAN,
Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

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Jurisdictional Statement

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QUESTIONS PRESENTED

1. In the state of New Jersey, where county committees are created by statute and forbidden to endorse candidates before the primary, which is mandated by statute for the purpose of ending manipulation of the nomination process by certain select members of political parties, does a practice by a county committee's chairman and leadership of creating, staffing and operating a parallel county "central" committee with substantial overlapping membership for the purpose of holding screening and endorsing conventions and endorsing candidates prior to the primary violate federal constitutional rights of a non-insider candidate for the United States Congress and his voter supporters who do not participate in the circumventive endorsement process so as to create federal jurisdiction where the complaint alleges the above and other

similar facts and violations of Art.I, Secs. 2 and 4, the 1st and 14th Amendments and the following statutes: 28 U.S.C. 1331, 1343, 2201, 2202 and 42 U.S.C. 1983, 1985, 1986 and 1988 ?

2. May a district court ignore the allegations of a complaint and go beyond its face in considering a dismissal motion and thereby find a lack of federal subject matter jurisdiction by considering instead the merits of the case ?

3. Does the delegation of federal constitutional authority in Art.I, Secs. 2 and 4 to state legislatures to furnish the statutes whereby the regulation of races for the Natioal Congress is accomplished in the first instance insulate violations of such state furnished but federally created law from federal jurisdiction ?

4. May elected party officials, elected according to a statutory procedure, use their authority thus furnished by the

state to create a separate but overlapping private body to endorse candidates in a manner forbidden to them in their statutory committee without affecting fundamental constitutional rights of those negatively affected by such endorsements so as to confer federal jurisdiction upon the resulting cause ?

5. May a political party insider group who are statutorily elected state officials as well as party officials, clad with the authority of the state, claim the invalidity of a statute under their claimed First Amendment rights, obtain a judgment of dismissal insulating that claim from effective remedial action and thus pre-empt the statute in practical effect without creating a mandatory appeal to this court by virtue of such pre-emption ?

6. Does a district court abuse its discretion as set out in Rule 15.1(i) when

it makes no separate findings of fact and law as required by Rule 52 of the FRCP in refusing a preliminary injunction, goes beyond the complaint and the affidavits to the merits, makes findings not supported in the record, and generally violates the rule of U.S. v Corrick 298 US 435 (1936) and Mayo v Lakeland Highlands Canning Co. 309 US 310 (1940) ?

7. Where a district court refuses to use its equitable powers to stop an ongoing scheme which it admits may be illegal that circumvents a statute affecting federal elections and prejudices the fairness of federal elections, may it continue to refuse to interfere with the practice of questionable legality of circumventing the statute or shall it stop the violative activity pending a full resolution of the merits of the matter ?

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Appellants,

v.

G. DALLAS DIXON, et al.,
Appellees.

Jurisdictional Statement

I. THERE ARE NO REPORTED OPINIONS BELOW

II. STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) THE NATURE OF THE PROCEEDING AND THE STATUTORY BASIS FOR JURISDICTION

(A) The Nature Of The Proceeding

Suit was brought by appellant Koczak and two appellant voters of his party, the Democratic Party of Mercer County, New Jersey. Appellant Koczak ran for the congressional nomination of his party. He and appellants Rotter and Resch wished his candidacy unburdened by inequalities violative of the Constitution. Plaintiff Koczak wishes the primary of his party relieved of illegal inequalities for his own sake as a candidate and also on behalf

of all candidates who are not part of the party inner machinery as well as for those in his party, (or who might join it) who wish to support and vote for him or any other non-insider candidate. Appellants wish that the fluidity of politics within the party which has been prescribed by the legislature may be declared and preserved. Appellant Koczak and his supporters claim a right under the 1st and 14th Amendments to emerge from the ranks as a candidate and challenge the established ideas of the party's present leadership in accord with the prescription of the legislature. Appellants wish to stop the practice of the leadership of the county party of endorsing candidates prior to the primary in violation of New Jersey statute N.J.S.A. 19:34-52, which forbids party committees to endorse so that all candidates in the party might be as nearly as practible equal in accordance with that

law.[1] Plaintiffs sought injunctions to stop the practice and damages.

Can there be evasion of the statute by use of another, overlapping committee of insiders formed outside the statutes that create party committees, in the manner of "jaybird" parties used in the South to maintain segregation,[2] without violating

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[1] N.J.S.A. 19:34-52 reads: "No state, county or municipal committee of any political party shall prior to any primary election indorse the candidacy of any candidate for a party nomination or position." Chapter 5 of Title 19 of the N.J.S.A. in turn sets out "PARTY ORGANIZATIONS" and, in Article 2 thereof, specifies how the membership of municipal, county and state committees will be elected and selected and how they shall be organized. Thus in New Jersey the political party organizations are creatures of statute and are regulated in their state function of selecting candidates in the primary to assure fair, democratic elections. In addition to being forbidden to endorse any party member as against another in the primary, the party organizations are forbidden to finance any primary candidate against another. N.J.S.A. 19:34-33.

[2] See Terry v Adams, 345 US 461 (1953) wherein evasion of federal constitutional requirements by use of a more restricted, unofficial "pre-primary" before the official primary was given the "jaybird" label in constitutional jurisprudence.

fundamental rights which are secured for primary candidates for Congress and their voter-supporters by the Constitution ?[3] The trial court denied injunctive relief and dismissed for want of jurisdiction and was affirmed without comment.

(B) Statutory Basis For Federal Jurisdiction

is found in (Ap 8-3), 28 U.S.C. 1331, 1343, 2201, 2202 and 42 U.S.C. 1983, 1985, 1986, 1988 in that rights are infringed which are secured by Art.I, Secs.2 and 4, Art. VI, C1.3 and the 1st and 14th Amendments. These include equal protection rights, due process rights, freedom of

[3]While the brief was in process, the Court handed down its opinion in Tashjian v Republican Party of Connecticut, Opinion NO. 85-766, Decided December 10, 1986, in which the majority, discussing primaries, said: "The constitutional goal of assuring that the Members of Congress are chosen by the people can only be secured if that principle is applicable to every stage in the selection process." This surely includes a pre-primary convention, as here, which, by screening and endorsement, substantially affects or alters the selection process. Otherwise the constitutional goal could be evaded.

association, and petition for redress.

The 1st and 14th Amendment rights are straightforward, though ignored below. But rights asserted under Art.I, Secs.2 and 4, though articulated by this Court long since, are detailed here since the district court treated them obtusely in its opinion and comments. They create federal law which is effectuated through statutes furnished by the fifty states.

In most part congressional races are regulated by prescriptions of the state legislatures, all of which are coincident with the laws regulating races for state office. This is because legislatures have, without exception, commingled this delegated federal authority with their authority to regulate the times, places and manner of electing their own, state officers and legislators. They have, in each instance, used both authorities to prescribe one set of laws that governs

both state elections and those for the National Congress.[4]

In 1884, Ex Parte Yarbrough, 110 US 651, held that Art.I, Sec.4 adopts State qualifications as a federal qualification for the voter; but his right to vote is based upon the Constitution and not upon the State law, ibid. p. 652. The office of member of Congress, "is created by th[e]...Constitution and by that alone." Art.I, Sec.2, adopting qualifications prescribed by the state legislatures for the electors of the most numerous branch of the state legislature, "adopts the qualification thus furnished as the qualification of its own electors for members of Congress." ibid. p. 663. [emphasis added]. The state legislature

[4]Congress has exercised the overriding authority which was withheld for it in the clause in the matters of election from contiguous districts, a uniform national date for general federal elections and in acts designed to limit or prevent corruption in congressional races.

prescribes pursuant to the authority delegated by Art.I, Sec.4 and, in so doing, furnishes the qualifications, but the legislature does not create the coincident law governing federal races, the federal Constitution does. idem.

So here, the same constitutional delegation of power in Art.I, Sec.4, creates the law regulating endorsements as part of the times, places and manner of electing members to the U.S. House, but the New Jersey legislature, pursuant to that delegation of authority, furnished the anti-endorsement statute, N.J.S.A. 19:34-52, that is applied to the federal as well as the state legislative races. The New Jersey statute as applied to the race for the House in the fourth district is thus federal law though not a federal statute. The candidate and his supporters have as much right to federally enforce a prescription of the state legislature

banning endorsements before the primary in New Jersey, (and hence pre-selection by a screening and endorsing convention) as they do the prescription furnished by the state legislature for the qualifications of electors of the most numerous branch of that legislature to qualifications for electors for members of the U.S. House.

Yarbrough has never been overturned, though there is an instance of subsequent dicta which, if read carelessly, might seem contradictory, but does not stand up as such under close analysis.[5]

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[5] Shoshone Mining Co. v Rutter, 177 U.S. 505 (1900) deals with possessory rights. In making the point that federal statutes establish the staking out of mining claims on federally owned lands by the use of local mining law, and thus spin part of the government property off into private possessory rights, the Court allowed as how Art.I, Sec.2 did not, by adopting the prescription of each state legislature for the qualifications for electors of the "most numerous branch" thereby make that prescription federal statutory law. This is true as far as it goes--if you want to analogize voters to exploitable minerals. (Plaintiffs contend that defendants wish to preserve a habit of "exploiting" the non-insider members of the party more than

Thus "The power...arises out of the circumstance that the function in which the party is engaged or the right which he is about to exercise is dependent on the laws of the United States." id, 662. The Framers chose state statutes to furnish the regulation of the federal races to accomodate the local regulatory scheme governing other elections in each state, so that they are, to the extent that they regulate federal races, delegated federal law that secures federal rights and are furnished by legislatures with intent to

(Cont.)
the legislature wishes.) It's true that such federal delegation of power does not make the resulting statutes furnished by state legislature part of the U.S. Code. But voters' rights cases since 1900 make it clear that voters' qualifications set by the legislatures and secured by constitutional provisions give rise to federal jurisdiction, affirming Yarbrough and repudiating any such extension of Shoshone beyond the realm of private possessory rights that are "spun off" from government ownership into the private sector. (Unless, of course, defendants would urge the revival of Dred Scott v Sandford, 19 How. 393 (1857) with particular application to insider control of the party's rank-and-file.

protect both state and federal rights. The systematic violation of them as they apply to federal races, as here, infringes upon federal rights which are secured by authority in Art.I, Secs.2 and 4.

It was unnecessary to repeat the exegesis in Yarbrough about the federal origin of this authority of the state legislatures and it was later held that these constitutional provisions directly secure federal rights when invoked via the federal civil rights statutes. United States v Classic, 313 US 299 (1941) held the right to vote for a federal officer, whether or not it be deemed a privilege of citizens of the United States[6] is directly secured by Art.I, Secs.2 and 4. Id.at 314-5, cases cited. Snowden v Hughes, 321 US 1,n.3 (1944). In Smith v Allwright, 321 US 649 (1944), Art.I, Secs.2 and 4,

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[6] as opposed to privileges of citizens of the several states, see Twining v New Jersey, 211 US 78, 97.

were used and jurisdiction established and have since been routinely invoked. The invocation of these provisions is via the predecessors of the civil rights statutes used here.[7] Even absent the 1st and 14th Amendment claims, federal jurisdiction would be established by the Art.I claims.

(ii)DATES BELOW

Complaint filed May 9, 1986. Hearing May 12. 2d hearing May 21; injunctive relief denied, dismissed (no federal jurisdiction) order to be drawn up by defendants; no opinion. With order still undrawn, plaintiffs petition for single justice relief; denied, Brennan, Stevens, JJ., May 29, 30. Meanwhile (per Clerk's office) stay and emergency relief sought

[7] In Yarbrough, e.g. reliance was upon then Rev. Stats. 5508 and 5520 in conjunction with the same constitutional provisions invoked here, which have been unchanged since 1787. Today these statutes are codified, with slight revisions, as 42 U.S.C. 1985 (c). In Smith, supra, the statute invoked, then 8 U.S.C. 43, is today codified as 42 U.S.C. 1983.

in district and appeals court. Results in 3d hearing May 30; district court affirms, dictating an opinion for the first time, per request from 3d Circuit delivered by counsel. Request for stay and emergency relief in 3d circuit denied. Order from district court Jun 2. Notice of appeal May 27, relying inter alia on Davis v Bandemer 106 US 2797, dec. Jun 30, 1986; brief filed 3d Circuit Aug 1. Sep 30, 3d Circuit affirms; no comment. Emergency preliminary relief, with stay, applied for Oct 10, to Brennan, J. On a (by then) standing order from Brennan,J., stay and emergency relief applied for in 3d Circuit Oct 15, denied Oct 22. Application to Brennan, J., denied Oct 22. Oct 28, referred to Chief Justice who refers it to Oct 31 conference; denied without comment, Order issues November 3. Notice of Appeal filed in the 3d Circuit Dec. 22.

(iii) THE STATUTORY PROVISION BELIEVED TO CONFER JURISDICTION ON THIS COURT

is 28 U.S.C. 1254 (2). Why appeal and not cert ? The answer, as in the parallel case of Hopfmann v Connolly, No. 85-1094, (pending 10 mos.,) is the pre-emption rule of Malone v White Motor Corp., 435 US 497.

Ultimately the claim of the defendant party officials and insiders that they may evade the statutory ban on pre-primary endorsements by party committee is based on an alleged First Amendment right. To see this it is only necessary to examine their contention that they may hold an endorsing convention despite the statutory ban in light of existing state law. It is then seen that the device of evading the statute with an overlapping unofficial committee violates established state law and therefore violates the federally created application of that law to federal races. The contention to the contrary is is seen to be merely a tactical "smoke screen." The purpose of this subterfuge

is revealed as a tactical maneuver when it is considered that the defendants raised no issue of abstention at the district court level, threby waiving it, only to attempt to raise it de novo on appeal.

That a "jaybird" committee violates N.J.S.A. 19:34-52 is clear from examining the entire statutory scheme to see the context of the statute. It's more evident yet if we look at the way this "jaybird" practice developed in conjunction with leading case law:

In 1903 New Jersey enacted statutes that have now become Title 19, regulating electoral activity, including political parties as a key component thereof. This statutory scheme established, inter alia, that all party nominations for state and federal offices would be by primaries in which all members are free to participate. Under this scheme political parties, as they relate to the electoral function,

were created by statute; nominations by caucuses and/or conventions were ended. A 1909 amendment provided for election at the primary to state, county and town committees. Later amendments in 1930 reinforced the overall intent by adding the anti-endorsement statute at issue and also the prohibition upon the financing of any primary candidacy by party committees.

In 1971, in the face of this statutory scheme, certain select members of the statutory MERCER COUNTY DEMOCRATIC COMMITTEE, predecessors of the present defendants, formed the unofficial committee, the MERCER COUNTY DEMOCRATIC CENTRAL COMMITTEE, whose purpose is set out in its rules, section 12: (Ap 8-51)

> "The purpose of the Central Committee is to endorse candidates for county, state and federal offices in the Democratic Primary in Mercer County, to the extent permitted by law. Unendorsed candidates may be entitled to run in the same column with the endorsed candidates but may not use the same slogan. The Committee shall adopt such rules as it deems necessary to accomplish the purpose with full

and fair consideration for all potential candidates."

Significantly, the phrase: "to the extent permitted by law" wasn't in the 1971 rules but is an amendment. Between 1971 and the date of this amendment, a leading decision held that evading the anti-endorsement statute by similar committees is illegal, a holding reinforced by other opinions. In Cavanaugh v Morris County Democratic Committee, 121 NJ Super 430, 435 (Ch Div 1972), a practice of having a subcommittee screening and endorsing candidates in the manner forbidden to full committees was struck down. Citing equity and substance, the court found the no-endorsement statute had a "great public purpose" and had been passed due to "public dissatisfaction with the political manipulation at conventions." It held "The major reason for changing to the primary election is to prevent political manipulation by certain select members of the party."

The defendants use a like evasive device, a "side-by-side," overlapping committee rather than a subordinate overlapping committee. This parallel but statutorily unauthorized committee meets each election year before the primary and endorses favored candidates, screening out other candidates. The names of endorsees are conveyed to the officials who decide upon ballot access, placement and slogans. (Each candidate may choose a slogan of 6 words or less to be placed next to his name on the ballot. N.J.S.A. 19:23-14 through 17 and 19:49-2.) Candidates may group together on ballots ("bracketing") based on "philosophy," devotion to the same "issue," or by "faction" within the party. The county chairman is chair of both official and unoffical committees. He thus places the imprimatur of the party's endorsement upon the endorsees chosen by the conventions and communicates it to the

county ballot officials who assign the top or "party" line to the party endorsees and allow them to choose slogans to make it clear that they are the "organization's" endorsees. The central committee rule 12 make it clear that controlling an official line and slogan for the endorsees is part of the committee's screening and endorsing purpose. Ap 8-51.

No attempt has been made, over the years, to communicate to the public that this endorsement which has such a strong effect is by a committee which is outside the lawful party electoral structure as established by statute and no attempt has been made to communicate that the central committee is a device to allow the party insiders to do as a committee what the statute bars. Defendant party officials hold out to the public that their actions in both committees, without distinguishing between them, are official party actions.

Thus they hold out, including to their own rank-and-file, their authority derived from the state's creation of the official, statutory county committees as apparent authority for the actions of the "jaybird" defendant CENTRAL COMMITTEE and act, in all respects, as if the central committee were clad with the authority of the State.

Deamer v Jones, 42 NJ 516 (1964) held courts will enter intraparty disputes in two instances: 1) when there's "violation of a controlling statute." and 2) where there's "infringement of a clear legal right." The case also established that in determining whether a particular situation is one or both of these, it is considered that "Political parties function through their county committees, and the members and chairmen of these committees are in a sense trustees of the party interests for the registered voters of the party in the county." So that under New Jersey law

there's no place for "jaybird" committees and there's a fiduciary or quasi-fiduciary obligation of committee members not to take part in such a device.

In Formal Opinion 1977 -- No. 9, the state Attorney General (not the present defendant,) said:

> "organizations similar to the Candidate Screening Committee in Cavanaugh are prohibited, under N.J.S.A. 19:34-52, from endorsing candidates prior to the primary election....Individual members of a party committee are not subject to a similar prohibition on pre-primary endorsements--the emphasis on members qua members being on the individual right of free expression under the First Amendment to the Constitution of the United States. Where such committee members consort to individually and collectively endorse a candidate, it seems clear, however, that the alter ego doctrine of the Cavanaugh opinion would prohibit such activity."

In a passage of particular importance because these defendants are, at bottom, trying to pre-empt the statutory scheme of nomination by primaries so they may "steer" or select candidates at a closed

convention, the opinion pointed out that Rogers v State Committee of Republican Party, 96 NJ Super 265 (Law Div 1967) established that:

> "selection of candidates for office is to be accomplished by the primary vote, not by political committee."

Three state Supreme Court cases reinforce this: Sadloch v Allen, 25 NJ 118 (1957); Kilmurray v Gilfert, 10 NJ 435 (1952); and Stevenson v Gilfert, 13 NJ 496(1953), and, as said in a later case, "instruct us that the public interest, as it is served by the multiparty political system, is a lodestar to the construction of Title 19," not the interests of a party inner group. Hand v Larason, 163 NJ 68 (Law Div 1978). It holds even where there is no "clear express statutory prohibition which would preclude" the challenged conduct, that "...the election laws must be read in pari materia; therefore, their intent must be gathered from the whole of the context."

So it can be seen that the use of the central committee to evade the statute's ban on endorsements is illegal under state law. Understanding that here enables the Court to see that the real reliance of the defendants-appellants is upon an alleged 1st Amendment right of speech and assembly which is asserted in an attempt to pre-empt the statutory scheme so as to allow a screening and endorsing convention as a matter of federal constitutional right. Hence the Malone pre-emption rule applies.[8]

Counsel for defendants Dixon and the County Committee explained it: (Ap 17-39)

> "The only entity that is regulated by 19:34-52 is the Mercer County Democratic Committee. If politicians

[8] Thus (Ap 36-19) counsel for defendants G. DALLAS DIXON, the chairman of both the official and "jaybird" committee, and the man out of whose law offices the insider organization actually operates in both its guises, and the COUNTY COMMITTEE, goes on at some length about the First Amendment rights of the insiders, comparing them, somewhat disingenuously, to the League of Women Voters.

in this county or activist democrats or a combination of the two get together to support candidates from a primary election they have a First Amendment right under the United States constitution to do that.

...

"And what plaintiffs here are trying to do is paint the supporters of Chairman Dallas Dixon, and activist Democrats and the Mercer County Democratic committee with the same brush and that is simply inappropriate because the statute doesn't say that active democrats may not meet to discuss political issues or endorse candidates. That would be a violation of constitutional rights. It says the county committee that is set up by statute may not meet,..."

Leaving aside the misrepresentations of plaintiffs' positions and allegations, we see that these defendants are challenging the statute on federal constitutional grounds.[9] Hence mandatory appeal lies.

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[9]This point was made in the brief of these defendants, viz: "defendants are prepared to set forth a claim that the statute violates the First Amendment of the United States Constitution if it is contended that the statute prohibits the activities of the Central Committee." I.e. they'll defer it if they can in order to shop the state forum, but ultimately the contention is that the by-laws of the central committee pre-empt the statute under constitutional right.

An illegal, unconstitutional private law-making power is being asserted disguised as a First Amendment freedom. The state legislature, elected by all the people, has decreed nomination by primary. The party inner elite has decreed de facto nomination by an "endorsing and screening" convention. The decrees aren't compatible and one must, of necessity, pre-empt the other. What we have is an attempt by the defendant party insiders and officials to pre-empt the statute with the collusion of the defendant state executive officials on spurious First Amendment grounds. They thus insert into the process the very "political manipulation by certain select members of the party," which, according to Cavanaugh, supra, the primary was adopted to prevent and thus arbitrarily arrogate unto themselves to override the "public dissatisfaction with the political manipulation at conventions" which that

court found was the reason for enactment of the ban on endorsements. They do this while attempting to deny jurisdiction to plaintiffs, as representatives of the thus disenfranchised rank-and-file that votes at the primary, to correct the matter in the federal courts with regard to the races for nomination for the National Congress. It is a subterfuge to evade federal jurisdiction. Radio Station WOW, Inc. v Johnson, 326 US 120, 129, and we urge this Court to recognize it as such.

STATEMENT OF THE CASE

Parties

Plaintiff-appellant STEPHEN A. KOCZAK is (plaintiffs maintain the primary election is void for unconstitutionality) a candidate for his party's nomination to the House for the Fourth District. Ap 8-3 The other plaintiffs-appellants, KATHERINE E. ROTTER and JOHN G. RESCH, are ordinary rank-and-file members of the Democratic

Party. Ap 8-4,5 None is a member of the defendant committees or has held or holds any party or elected office. None of them have previously run for such office. All are non-members of the party organization that steers the endorsements complained of. Ap 8-1-5,30-32[10] Plaintiff KOCZAK recently returned to his boyhood home in Trenton, in the district, where he lived till he was 21, after an absence of years during which he attended Harvard, served in the military and foreign service (much of the time overseas) and then worked for private organizations. During the last part of this time away from the area, after voting absentee for many years, his voter registration was in Washington, D.C.

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[10] In the 3d circuit a Rule 12 motion supported by affidavits is in effect one for summary judgment under Rule 56 and will be treated as such. Thermo-Plastics Corp. v International Pulverizing Corp. (DNJ 1941) 42 FSupp. 408, 5 FR Serv 12f.11, Case 1. See Moore's Federal Practice, Vol 2A, par. 12.09,n.13 for a roundup of cases in most circuits supporting this view.

He wasn't in the district when the illegal practices complained of were instituted.

Defendant-appellee G. DALLAS DIXON is a Mercer County Democrat who is a party "insider." He heads the organization of the party. Ap 8-6[11] He is chairman of both defendant committees. Ap 8-5,6,7 He practices law in Trenton and runs the committees out of his law office, making no effort to inform the public that there are two and not one, or that the central committee exists for the sole purpose of

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[11] The plaintiffs have so pled. In Frederick Hart & Co. v Recordgraph Corp. (CCA3d 1949) 169 F2d 580, 7FRD 43, 11 FR Serv. 56c.41, Case 12, the 3d Circuit reversed where the dismissal of a complaint was based on affidavits supporting the motion and ignored the facts pleaded. Judge Kalodner said: "An affidavit cannot be treated, for purposes of the motion to dismiss, as proof contradictory to well-pleaded facts in the complaint." See Moore's, supra, loc. cit., p. 2296, n.18. No doubt this or other similar contentions close to the heart of the issue will be contested, but since discovery wasn't reached, the contentions of the plaintiffs have to be accepted for purposes of this appeal and should have been so accepted by the lower courts.

doing that which the authorized committee is forbidden by law to do. Ap 8-21-23[12]

Defendants-appellants MERCER COUNTY DEMOCRATIC COMMITTEE and MERCER COUNTY DEMOCRATIC CENTRAL COMMITTEE are the authorized and unauthorized committees referred to above, respectively. They've

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[12]Here again, there might be contention as to facts. But Judge Maris early laid it down in the 3d circuit that on a motion it is "no part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried....All doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for...judgment." Toebelman v Missouri-Kansas Pipe Line Co., (CCA3d 1942) 130 F2d 1016, 1018, 6 FR Serv 56c.41, Case 7. This was reaffirmed in Sarnoff v Ciaglia, (CCA3d 1947) 165 F2d 167, 11 FR Serv 56c.41, Case 1 and it was held there also that the trial court cannot resolve issues of credibility on the basis of conflicting affidavits. See Fairbanks, Morse & Co. v Consolidated Fisheries Co., (CA3d 1951) 190 F2d 817, 824, 15 FR Serv 56c.41, Case 14. (Staley, J.) See Judge Freeman's opinion in Season-all Industries, Inc. v Turkiye Sise Ve Cam Fabrikalari, S.A., (CA 3d 1970) 425 F2d 34, 39. Of course, the 1963 amendments to the federal rules allowed affidavits, when there is no issue of fact, to cut through pleadings, but where there is contention the burden is still very much on the movant.

the same chairman and officers; 55% of the central committee are also members of the county committee. Ap 8-7-11; 8-22-23;8-40 Defendant DIXON and the other officers of the central committee hold the posts, id. because of their positions on the county committee. The committees operate out of the same offices, adjacent to those of defendant DIXON, on a day to day basis. The same person, defendant LOUISE LOMMA, does the administrative work for both. Ap 8-13 Defendant DIXON, by the central committee rules, appoints 25 of its 194 members. Ap 8-40,41. He also controls its agenda and meeting calls. Ap 8-45-53 The county committee's members are selected at the primary pursuant to statute. Ap 38-15 Central committee members are chosen by its self-promulgated rules. Ap 8-40 By its rules its purpose is to screen and endorse candidates (Ap 8-51) as it has done each election year. This year it endorsed defendant LAURENTI. Ap 8-9

Defendant JEFFREY LAURENTI is a Mercer County Democrat who ran for his party's nomination for the fourth district seat this year. The central committee endorsed him at its Apr 2 endorsement and screening convention. No other members vyed for the endorsement (unbeknownst to plaintiff KOCZAK at the time.) Ap 8-11-13 Ap 11 Defendant LAURENTI held out to the press and public that he was the endorsee, not making an effort to clarify that he was the endorsee of an unofficial committee and that endorsements by party committees are forbidden by law. As a slogan on the ballot, he used: "Regular Democratic Organization" thus "bracketing" his name and slogan on the "party" line with the candidates using a slogan "Official Regular Democratic Organization." Ap 32,33,35 The "organization" thus named is intended as and is that of defendant DIXON, embracing both the official and unofficial committees. Ap 8-21.

Defendant GERALD STOCKMAN is a Democratic Party insider who is a state senator. He is a member of the central committee but not of the county committee. He nominated defendant LAURENTI at the unauthorized convention of the central committee. Ap 8-12

Defendant LOUISE LOMMA is a member, employee, and secretary of the defendant county committee. She is a member of the central committee also and administers the day-to-day business of both from offices next to those of defendant DIXON. Ap 8-13

Defendant HOWARD KAYE is a member of both defendant committees and is chairman of the "Credentials Committee" of the defendant central committee. Ap 8-14

Defendants JANE BURGIO, W. CARY EDWARDS and THOMAS H. KEAN are Secretary of State, Attorney General, and Governor of New Jersey, respectively. They are responsible for administering and enforcing the election laws. Ap 8-14-17

Development of the Cause of Action

Earlier this year, certain active (but then non-candidate) Democrats, including Mrs. Gertrude Dubrovsky, a member of a town committee and the central committee, sued to stop the illegal endorsements. Gertrude Dubrovsky, Joan Forscher and Joseph O'Neill v. Mercer County Democratic Committee, Superior Court of New Jersey, Chancery Division, Mercer County, Docket No. C-86-0068E, Hon. Paul G. Levy, JSC. The case pends and there is no opinion or law in the matter at this time. Judge Levy denied preliminary relief on the grounds that the central committee, if it had at the most, a 55 % overlap with the county committee, was not a true "alter ego" of the latter. Defendants here argue that this implies the necessity of close to complete one-to-one correspondence and congruence before such "alter ego" that would violate the statute could be found.

When plaintiff-Appellant candidate, returning to Trenton, decided to seek his party's nomination for Congress, he read the statutes and the material handed out by the offices of the Secretary of State. Having done so he believed endorsements were outlawed and did not know of this practice of endorsing by a committee claimed to be separate. Ap 11 (Subsequent research in the State's newspapers has revealed that the controversy has surfaced around the state from time to time and that the attempts to evade the statutory scheme are recognized. See, e.g., the Newark Star-Ledger for February 1, 1981, wherein it was concluded that after the suspension of the anti-endorsement statute for a few years had lapsed, "The county committees and their chairmen returned to methods devised to getting around the

endorsement prohibition.")[13] It is clear from the press that party-organization-neutral selection of candidates at a primary as intended by the legislature was not honored by many insiders in recent years. Plaintiffs learned of the practice when they read of the Dubrovsky litigation in the papers of April 3, 1986. Ap 11[14]

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[13] Or see the Trenton Times of Sunday, April 27, 1980, p.C7, the article: "Carabelli back in fold: Tighue says he's ignored." This article openly states that "Mercer County Democrats picked" a candidate to be their nomminee at an insider convention (which now turns out to have been the meeting of the central committee.) It also tells about how the convention "fenced out" another candidate. The endorsement, in the article, is called the "organization nod." Defendant Laurenti, then the Trenton Democratic Committee Chairman and executive director of the state Senate, is quoted as saying how the then county chairman, in a break with then recent tradition, "allowed a number of local leaders to arrive at their own consensus" on a candidate. He then is quoted in the article as speaking of the selection of the party's candidate as being the selection of the party's executive committee the preceding Monday. See the extensive file of clippings attached to the petition of plaintiffs to the Court on Oct 22 that was referred by the Chief Justice to the full Court for the Oct 31 conference.

When her case came to his attention in the press, plaintiff KOCZAK contacted Mrs. Dubrovsky and inquired into the matter, attending the subsequent hearings on the motions for preliminary relief in her case. In that proceeding a counsel for defendants who also appears here raised the argument that N.J.S.A. 19:34-52 was unconstitutional under the First Amendment freedoms of speech and assembly and was therefore void, asking permission to expound upon the matter further. At the hearing, however, on April 22, 1986, the

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[14] This Court should note: plaintiffs' allegation that the existence of the subterfuge of the unauthorized central committee had been in use for several years was seized upon by defendants below to claim that plaintiffs had knowledge of the practice for several years, ignoring the difference between existence and scienter. The two are not the same. It is of the essence of a scheme such as the one complained of that what is truly going on be kept obscure and within the "certain select members"[15] perpetrating it as much as possible. The court below favored this misrepresentation and it will likely be tried here, however immaterial, ignoring the allegations and sworn affidavits of the plaintiffs and the case law.

county court avoided the constitutional contentions and declined to stop the illegal endorsements as stated. As the judge saw it, a 55% overlap in membership by itself did not show "alter ego"-ness. Then the plaintiffs brought this suit.

Plaintiffs sued under Art.I, Secs. 2 and 4 of the Constitution as set out in the discussion of bases for federal jurisdiction above and also under the 1st and 14th Amendments. Plaintiffs seek a declaration that the endorsement practice violates these constitutional provisions and the applicable laws, injunctions against defendants to cease carrying out and condoning the practice of endorsing in violation of the Constitution and laws, and damages for the advantage illegally gained in violation of the Constitution. Plaintiffs moved simultaneously for relief restraining defendants immediately from further endorsement activity including use

of the said slogan for defendant LAURENTI. The primary was then a little over three weeks away. Defendants opposed, raising issues of lack of jurisdiction, failure to state a claim upon which relief can be granted, laches, inconvenience and, under Cavanaugh, lack of "alter ego."

Defendants DIXON and the MERCER COUNTY DEMOCRATIC COMMITTEE moved to dismiss on grounds of lack of jurisdiction prior to the hearing on the injunctive relief. Ap 13 Injunctive relief was denied and the matter was dismissed upon grounds of lack of jurisdiction, with a comment by the judge that were he a state court judge he would dismiss based on laches, observing that plaintiffs had no chance of success on the merits because of no jurisdiction. After denial of emergency and preliminary relief as noted (in effect a rehearing reaffirming with an opinion dictated into the record at the request of the 3rd

circuit), appeal was pursued. There the two last defendants raised an abstention doctrine argument not raised below.

STATEMENT OF WHY THE QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION

The jurisdiction of Federal courts, where it depends upon the character of the cause, embraces "all cases in law and equity arising under the Constitution and laws of the United States." This extends jurisdiction to all cases described, without making in its terms any exception whatever and without any regard to condition of parties. Cohens v Virginia (1821) 19 US 264; Ableman v Booth (1859) 62 US 506. It extends it to large classes of cases determined by character of the parties or natures of the controversy. Ex Parte Yerger (1869) 75 US 85.

The district court found that it "does not even have jurisdiction in the matter." Ap 1-5 The court did not "see" any

"subject matter jurisdiction." Ap 1-4 Although the opinion surrounds this finding with one of a failure to state a claim, an extrapolated state court finding of laches, and one of lack of connection between the act of endorsement complained of and the slogans and arrangement of the primary ballot, the court stated elsewhere in the record that it based the decision solely on the jurisdiction question. In the May 21 hearing, at which there was no formal opinion, even though the court allowed in and commented upon a number of substantive matters, it stated at the end:

> "Lastly, I am not in any way passing on the merits of the plaintiff's complaint....my dismissal is totally without merits, and it is for the jurisdictional reason which I have expressed." Ap 17-86

The court reaffirmed this in the May 30 hearing[15] in summing up its reaffirmation of the earlier decision.[16] The court then noted that it had made an oral decision from the bench in the earlier hearing and asked why it should not just reaffirm that. Plaintiffs' counsel informed the court that the appeals court had requested a formal opinion (Ap 36-42) which would enable review and the court dictated one, which makes the lack of explanation or analysis of the jurisdiction question in that opinion all the more striking.

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[15] In the last part of the May 30 hearing, the court, when pressed by defendants to make further finding on the merits, said: "I really didn't read the merits of it in the first place. I just want the record to be very clear and I appreciate your argument. I am not agreeing or disagreeing with what you said. I just never considered it in that way, quite frankly. I never considered the merits."

[16] "As a matter of fact, having had additional time to study it, I was rather rushed last time, I am more confident now than I even was on the first go 'round that my original decision was legally proper, that is to say, that this Court has no jurisdiction to hear and determine this matter." Ap 36-41

The opinion demonstrates a confusion between the jurisdictional issue and substantive issues. E.g., in denying plaintiffs preliminary relief, the court said: "Not only is there not a likelihood of success on the merits, but quite frankly, there is no likelihood of success, since the Court does not have jurisdiction in the matter." Ap 1-5 This follows a finding that plaintiffs "may have a claim under state law." Ap 1-3 In other words, likelihood of success on the merits, with regard to plaintiffs motion, was ruled against based on the unexplained jurisdictional decision. This will be discussed more fully below, but it illustrates confusion in the mind of the court that is evident throughout.

Rather than explain the jurisdictional decision, the court misrepresented plaintiffs' case as a state law matter, viz:

> "The essence of the plaintiffs' complaint is that the Mercer County Democratic Central Committee is the alter ego of the Mercer County Democratic Committee and since New Jersey Law forbids and prohibits the latter from endorsing primary candidates, it may not do so through the former." Ap 1-2,3

This is rather like saying that the question of whether or not one human being can own another is a matter of local law of property only, see Dred Scott, supra. It ignores the federal constitutional allegations of the complaint as if of no moment even though the court clearly, from its comments, perceived the substance of at least the 14th Amendment claims. Ap 17-44,45,46 It is of the essence of the complaint that, regardless of whether there might be some technicality which would allow the central committee to endorse (or more likely a friendly state forum to allow them to get away with it), that it does so violates the 1st and 14th Amendment rights of the plaintiffs as well

governed by the no-endorsement law which the legislature has prescribed pursuant to its delegated federal authority under Art.I, Secs.2 and 4. The unconstitutional inequality resulting would not be cured by any such evasive technicality even should there be one. And the authorities reveal clearly that there is not one at present.

The defendants, however they may dissemble, rely upon authority and color of state law to give their endorsement weight. The state creates and finances the primary and it creates the party committees that are forbidden to endorse and finance as between party members. If defendants were not clad with state authority by their official, publicly elected party positions and status, their use (or condonation by neglect) of a "jaybird" endorsing system would not have the effect of official endorsement complained of. If they truly were like

the League of Women Voters, as defense counsel disingenuously suggests, then their endorsement would not be the endorsement of the party. The inequality in voting weight as between insiders and outsiders they create by having an insider endorsing and screening convention in defiance of the statutory scheme, the impingement upon the associational rights of non-insider candidates and their supporters which they create by materially weighting a "pre-selection" of candidates, their bypassing of the right of citizens to have their elected representatives in the legislature determine these matters, their "de-democratizing" of the candidate selection process, all these things would not have the weight and effect that they have of, as the court below so candidly put it, "steering" the system.[17]

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[17] "THE COURT: Oh, I understand that, that your client was an outsider and that inner group was steering it, but whether he is an outsider or an insider, everyone knew

An officer clad with authority by the state cannot as a means of doing wrong forbidden by the 14th Amendment or any other part of the Constitution, proceed upon the assumption of possession of state power, and at the same time, for purpose of evading application of that amendment or another constitutional provision, deny the power (i.e. claim to be just private citizens exercising 1st Amendment rights) and thus accomplish the wrong, where, for purpose of enforcing rights guaranteed by that Amendment (or any other provision) when it is alleged that state officer, in virtue of state power, does acts which, even if permitted, (as here by neglectful acquiescence) prima facie would violate the amendment (or other provision). Home Tel. & Tel. Co. v Los Angeles (1923) 227 US 278. The Home Tel & Tel test is that

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how the system worked, whether it was working legally or illegally. Everyone knew how this system was working."

the question of federal subject matter jurisdiction under such 14th Amendment claims is to assume that the officer possessed the requisite color of state authority if there would not be the opportunity to perform the act but for possession of some state authority. id.

One may argue that the intertwined rights of voters and candidates espoused by plaintiffs here fall under Yarbrough; U.S. v Classic, and Smith and progeny, as plaintiffs do, or one can say that such rights are determined by Shoshone and law governing the privatization of exploitable government resources, as defendants do, but the debate entails substantial federal questions. That laws governing House races are entrusted by Art.I, Sec.4 to the legislatures in the first instance doesn't rob the questions of their federal nature.

Federal jurisdiction exists because there is no way to decide the contentions

raised here by plaintiffs in the complaint without deciding federal constitutional issues. Gold-Washing & Water Co. v Keyes (1878) 96 US 199; Tennessee v Davis (1880) 100 US 257; Railroad Co. v Mississippi (1880) 102 US 135; Pacific Railroad Removal Cases (1885) 115 US 1; Starin v New York (1885) 115 US 248; Germania Ins. Co. v Wisconsin (1886) 119 US 473; Bell v Hood (1946) 327 US 678. Three members of the Court have held that where this type of 1st and 14th Amendment claim involves only state races there is a substantial federal question. Bellotti v Connolly (1983) 103 SCt 1510.[18] Later, under the

[18] Stevens, O'Connor and Rehnquist, JJ., in dissent, ("substantial, unresolved questions regarding the accomodation of competing First Amendment values; the interests of would-be candidates and voters in eligibility for the ballot, and the interests of party members in political association..." id 1510 "Unquestionably the issues presented by these appeals are substantial." id 1517 The dissenters agreed with the Massachusetts Attorney General that allowing parties to set rules for ballot access "can permit the virtual

same state laws as applied to a national congressional race, the same 1st and 14th Amendment claims at issue here were raised with defendants who argued no jurisdiction and a First Amendment right of a party to use a convention to control primaries. Hopfmann v Connolly (1985) 105 SCt 2106. Cert was granted unanimously, the Court holding: "Among the theories [plaintiffs] advanced was a claim that the provision, as enforced by Massachusetts [or, as here, not enforced] violated the First and Fourteenth Amendments" It appears that federal jurisdiction of cases like this one is now a settled matter.

However, all that is necessary is that the plaintiffs' claims in their complaint be substantial, not even settled, and

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nullification of the primary process;" and states may not be able to retain the authority to assure a fair and open primary. id Virtually the same can be said about allowing party insiders to use a similar "jaybird" convention system to "steer" the results.

their claim cannot be dismissed from the federal courts, even if the averments be found wanting in merits. Hart v B.F. Kieth Vaudeville Exchange (1923) 262 US 271. Here it is evident that the court found the merits of greater significance in support of its decision than the actual elements necessary to find or not find jurisdiction. This was improper. The "face of the complaint" rule applies and here the lower court ignored it, not once referring to or considering allegations in the complaint in arriving at or supporting its decision. Louisville & N R. Co. v Rice (1918) 247 US 201.[19] It commented upon the good faith of the plaintiffs, were they but in a state court. Ap 17-22 But it failed to deal with the allegations of their complaint, indicating that

[19]Except, of course, with regard to the question of laches, toward which the court was so predisposed as discussed below, where it insisted on misreading the allegations of the complaint as regards existence of the practice vs. scienter.

federal issues of unequal protection could be raised only if the state forums were first tried and found wanting. Ap 17-22,23,24 This is error. Railroad & Warehouse Com. v Duluth S.R.Co. (1927) 273 US 625; Lane v Wilson (1939) 307 US 268.

Thus, the district court ignored the "face of the complaint rule," improperly suggested an exhaustion of state remedies doctrine, went into the merits on no evidence,[20] ignored the allegations of the complaint and indicated that it had made up its mind about the issues before the

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[20] After the court went on at some length about the availability of state remedies and forums, plaintiffs pointed out that there was a state court proceeding, involving different plaintiffs, that seemed to be completely stalled. Ap 17-24-27 The court agreed with plaintiffs that the denial of preliminary relief in that proceeding was on a point that was not dispositive. Ap 17-28 Yet when plaintiffs sought to introduce the lead plaintiff in that proceeding to testify about her knowledge of these practices and her efforts to correct them, the court refused vehemently, saying: "We are not taking testimony. This is an application on cross-motions. This is not, we are not taking testimony."

hearing even began based on its perception of laches. Why does this deserve plenary review ? Because, as a careful reading of the hearing transcripts at Ap 17 and 36 shows, here is a court perceiving the inequalities perpetrated by the systematic violation of the statutory scheme but ultimately deciding that it cannot do anything to stop the "system" which it concedes may or may not be legal, as if the thought of actually upholding these federally secured rights of ordinary voters and non-mainstream candidates within parties were as unthinkable as the thought of black voters and candidates effectively participating in the mainstream of politics was in the segregationist South. This court has recognized, in Davis, supra, the importance of applying equal protection of the laws under the 14th Amendment to political as well as racial groups. There

can be no important political group in American political life than the ordinary mainstream of party voters and those candidates who emerge from their ranks rather than from the inner circles and conventions of the partys' established leadership. They are equally as important to the "fluidity" of American political life as the candidates and voters whose franchise was abridged in the Jim Crow South or in the apportionment cases. They are as important as the minor parties and candidates whose rights were recognized in Williams v Rhodes 373 US 23 (1968); Anderson v Celebrezze 460 US 938 (1983) and similar cases. It should be made clear to that a failure to address the constitutional rights of this important group in the hopes that systems which may or may not be legal can keep operating because of indifference on the part of the authorities who should be assuring their

legality will not be tolerated in the name of unsupported jurisdictional holdings that challenge the established holdings of this Court, that the courts of this nation are still available to the vast majority of the electorate who are the rank-and-file of the major political parties when their right to have their vote count-- fully-- when they vote for congressional nominees is threatened by the inevitable process of insider attempts to consolidate "elitist" and anti-democratic control, regardless of how familiar and comfortable this inevitable tendency may become. In the constitutional debates[21] James Madison pointed out that delegation of the power to state legislatures in Art. I,Sec.4, was subject to recall by Congress because to give it exclusively to states would enable the latter to, by slow steps, dissolve the union. Now that primaries are an

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[21] Quoted in U.S. v Gradwell 243 US 476, at 484 (1919)

essential part of the electoral process, to allow parties to subvert them by private rule-making would let parties do what the Framers restricted state legislatures from doing, an unacceptable proposition in a federal republic.

ABUSE OF DISCRETION BY THE DISTRICT COURT IN DENYING PRELIMINARY INJUNCTIVE RELIEF

Given that federal jurisdiction exists and dismissal was error, was the denial of preliminary relief error ? How did the district court abuse its discretion in denying the preliminary injunctive relief sought, particularly with regard to U.S. v Corrick 298 US 435 (1936) and Mayo v Lakeland Highlands Canning Co. 309 US 310 (1940) cited in Rule 15.1(i) ? These cases dealt with interlocutory appeals. what about this situation where denial of preliminary relief is appealed along with a dismissal and it turns out that the dismissal was error ? The rule speaks of appeal from denial of a preliminary

injunction as well as from a grant of one.

With refusal, as with granting, the inquiry on appeal should be limited to the question of abuse of discretion. Applying the Mayo language to this case, it is seen that discretion was abused in not granting the preliminary injunctive relief sought:

> "[t]he question before it [the lower court] was not whether the [failure to obey and enforce N.J.S.A. 19:52-34] was constitutional or unconstitutional; was not whether the [defendants] had complied with the requirements of the act, if valid, but was whether the showing raised serious questions, under the Federal Constitution and the state law, and disclosed that [lack of] enforcement of the act, pending final hearing, would inflict irreparable damages upon the complainants." [22]

Thus confining the question, this Court made clear that adherence to Rule 52 (a) was required, with clear findings of fact and law and support of the former by the

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[22] The lower court here seems to have overlooked, despite being urged otherwise, that it's defendants who're violating the law in question and urge its nullity under the First Amendment, not the plaintiffs.

evidence and the record. The language in Mayo about the lower court applies here:

> "The observations made in the course of the opinion are not, in any proper sense, findings of fact upon these vital issues. Statements of fact are mingled with arguments and inferences for which we find no sufficient basis either in the affidavits or the... [allegations of the complaint].
>
> "It is of the highest importance to a proper review of the action of a court in...refusing a preliminary injunction that there should be fair compliance with Rule 52(a) of the Rules of Civil Procedure. [footnote omitted]"

Here, the court, as it admitted in an exchange with plaintiffs' counsel during the May 30 hearing, had already decided before reading anything from defendants, i.e., before any cross-motion for dismissal was made, when the only motion outstanding was plaintiffs' for immediate injunctive relief, that it would lean toward not taking jurisdiction of the matter based on a theory of laches.[23]

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[23] Ap 36-15 "I didn't, I am not hallucinating. I read it in your moving papers, because I read it before I

It is not surprising, in light of this predisposition, that the standard of Mayo and Corrick was violated. When prodded by the appeals court into giving an opinion, the district court addressed the question, essential to preliminary injunction findings, of likelihood of success on the merits, and found:

> "Not only is there not a likelihood of success on the merits, but quite frankly, there is no likelihood of success, since the Court does not even have jurisdiction in the matter." op. cit.

(Cont.)
received anything in response from the defendants." (This refers to the matter alluded to above of confusing the existence of the practice complained of, as alleged in the complaint, with scienter on the part of plaintiffs.) After an attempted interjection by counsel, the judge then revealed that he had become predisposed not to take jurisdiction of the matter because of the lateness of the filing as he saw it: "And it piqued my interest, because I know I think maybe the day before I received at my own house, the announcements of the primary or, it was a couple of days later, whatever it was, the mailing, and I said my God, how am I going to get involved in something like this when, you know, the horse race is already under way ? Ap 36-16"FN

Thus the court below did not really consider the likelihood of success on the merits in response to plaintiffs' motion but cut to the dismissal motion and, deciding that in accord with its admitted predisposition, used that bias to dispose of the required issue with improper support, a circular process of reasoning.

This circular reasoning as we have seen was based upon the mistaken notion that 50 separate state statutory schemes could not embody federal law governing the times, places and manner of electing members of Congress. Plaintiffs' lengthy briefs going into constitutional cases supporting its arguments in considerable detail, along with lengthy oral argument, were dismissed as "vague references to constitutional provisions...and a short

seminar in the federalist papers,..."[24]

Earlier, speaking of plaintiffs' use of these documents shedding light on the intent of the Framers, the court said:

> "Of course, I am appreciative of the Federalist papers. I have read what you have given to me, I read them in college, but we are not dealing in history here, we are dealing in law, and even a new judge like myself doesn't want to get reversed. Let's put it to you that way." Ap 17-5

Having thus dispensed with any support for holding on the meaning of constitutional provisions at issue from those who drafted them, the court then proceeded to find:

> "I am firmly of the opinion that this is a classic traditional and textbook example of a plaintiff who knew or, at the very least, should have known, although I hold and find that the plaintiff knew of the rights which he is bringing to this Court. We are dealing with someone who is intricately involved in the election process, and the facts upon

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[24]Ap 1-4 Two justices of this Court received plaintiffs first request here for single justice relief which was then filed with a brief cover below for the brief for the May 30 hearing, so that the petition on file here will demonstrate that plaintiffs briefed at length and in detail.

> which this complaint is based were known by him, or at the very least, and I am not capitulating my decision to that point, should have been known. For him to come to court with an application, I think the application was filed in front of me approximately two weeks prior to the primary, [25 days] is in such poor taste that I would prefer not to use words to describe the laches which were engaged in and the expense and the inconvenience which the complaint seeks to put everyone to." Ap 1-6

Thus the court preferred not to use words to provide reasons for a theory of laches affecting jurisdiction based, not on an articulated balancing of the equities involved, but on a theory of taste. It would seem it owed words to the plaintiffs seeking the injunctions under Mayo and Corrick. This considering of the matter as de gustibus is illuminated by its admission in the May 30 hearing set out in n. 17 above about the steering system that everyone knew about whether legal or illegal. When the Court explained how the system works, counsel said: "I understand,

your Honor." The court replied: "Why don't you relax ?"

In light of this attitude as the support of the court's findings the application of precedents from the civil rights struggle in the South by plaintiffs seems apropos. In light of its failure to discuss any equity on plaintiffs' side though a number were briefed and argued, it scarcely seems a legitimate support for denying the request for injunctive relief that the request was late in the day and that the "system," regardless of its legality, should not be disturbed. An equitable defense requires clean hands and the doing of equity by its invokers. Plaintiffs' arguments in this regard were ignored. If this were a valid defense, segregation would be with us still.

The court found it:

> "extremely costly to reprint the necessary ballots, and it causes confusion, complexification, and has very poor results on the voting public."

It did not speak of the cost to the plaintiff candidate to overcome the advantage of the prohibited endorsement and, of cost to the voters of thinking that they were beneficiaries of the no-endorsement primary selection process enacted by their legislature when in fact the process is being "steered" to their disenfranchisement. The court should have taken related allegations of the affidavit and complaint as given. The cost of destruction of a primary system by slow degrees of acquiescence and a hanging out of a "do not disturb sign" to those who would challenge such choking of the democratic process should be considered.

The court then made a finding that:

> "there is absolutely no connection between the endorsement which plaintiff challenges and the slogans on the ballot which plaintiff seeks to remove."

The lack of support for this finding is seen from defendant Laurenti's slogan: If "Regular Democratic Organization" doesn't indicate to the voting public in this situation that the man using it is endorsed by the party there's not likely to be a phrase that would so indicate.

There weren't proper findings supporting denial of preliminary relief to plaintiffs' prejudice. The effect, with the failure to accept jurisdiction, like the actions of the court and the parties benefitting from the error in Corrick, is to condone and perpetuate violation of the statute. The statute shouldn't be unenforced till the issue's decided. It's presumed legitimate. The circumvention should be stopped.

The leading cases concerning an unconstitutional continuing evasion of constitutional strictures and laws designed to insure fair elections are

from the Civil Rights struggle in the South. Hamer v Campbell 358 F2d 215 (CCA5 1966), cert.den.1966 385 US 851; Bell v Southwell 376 F2d 659 (CCA5 1967); and Brown v Post 279 FSupp 60 (EDLa 1968) There the courts were faced with an ongoing "system" that everybody knew about but whose legality was as questionable as the "system" outlined in the complaint in this case. In the two earlier cases of the three that went to appeal the plaintiffs encountered the same type of reaction as encountered here in the district court: a reluctance to disturb an admittedly dubiously legal system that insiders were comfortable with and reluctant to change, a concern for protection of the unconstitutional activity of long duration rather than the rights being infringed. Because the first two cases were decided the way they were, the third one was decided

correctly at the district court and then the practices virtually ceased.

CONCLUSION

Races for the national Congress and the rights of candidates and their supporters with regard to them are federal matters and where inequalities under the 14th Amendment and impingement upon associational freedoms under the 1st are alleged, those allegations, for purposes of a dismissal motion, are taken as true and, being non-frivolous, jurisdiction should be noted. In the situation where allegations on their face establish an ongoing, longstanding evasion of constitutional strictures protecting fair primaries and the state laws embodying them, injunctive relief should be available to those harmed by the unconstutional practices and, where not granted below, corrective retroactive relief should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE UNDER RULE 28

I hereby certify that I am a member of the bar of this Court, and that I have served by U.S. Mail, first class, postage prepaid, this 29th day of December, 1986, true and accurate copies of this Jurisdictional Statement, together with the accompanying appendices, in two volumes, 3 copies for each defendant, upon the following counsel of record below: Donna Kelly-Boccher, Esq., Dep. A.G., Hughes Justice Complex, CN 112, Trenton, NJ; Lenin I. Fishman, Esq., 150 West State St., Trenton, NJ 08608; Mark Setaro, Esq., 222 S. Broad St., Trenton, NJ, 08608; Barry D. Szaferman, Esq., 640 S. Broad St., Trenton, NJ 08608; Walter R. Bliss, Jr., Esq., 126 Wall St., Research Park, Princeton, NJ 08540; John J. Hoagland, Esq., 303 George St., 3d Fl., New Brunswick, NJ 08901; John C. Sahradnik, Esq., 212 Hooper Avenue, P.O. Box 757, Toms River, NJ 08753

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